Re Osman bin Bachit

HIGH COURT (MELAKA) — ORIGINATING MOTION NO 25-6-1997
AUGUSTINE PAUL JC
31 MARCH 1997

Evidence *— Presumption — Death — Death on a given date — Whether there can be a presumption as to the time of death — Evidence Act 1950 s 108*

By a motion dated 30 January 1997, the applicant prayed for an order that the deceased be presumed to have died in 1938 and that he be granted leave to depose that the deceased died in 1945, pursuant to s 108 of the Evidence Act 1950 ('the Act'). The motion was supported by the affidavits of the applicant and two other persons. The two persons deposed that they had witnessed the death of the deceased in 1938.

Held, dismissing the motion:

(1) Although a person who had not been heard of for seven years was presumed to be dead, there was no presumption as to the time of his death under s 108 of the Act (see p 448H).

(2) If it was sought to establish the precise period at which a person died, then it must be done by actual evidence like the proof of any other fact (see p 448H); *R Muthu Thambi v K Janagi* [1955] MLJ 47 and *Re A Penhas, deceased* [1947] MLJ 78 followed.

(3) Section 108 of the Act contemplated a case where nothing more was known than that a person had not been heard of for seven years or more. It did not prevent the court from finding on circumstantial evidence that the death of a person occurred before the expiry of seven years from the date of disappearance (see p 449D–E).

[Bahasa Malaysia summary

Melalui suatu usul bertarikh 30 Januari 1997, pemohon telah memohon untuk suatu perintah bahawa si mati dianggap telah meninggal dunia dalam tahun 1938 dan supaya dia diberi kebenaran untuk mendeposkan bahawa si mati telah meninggal dunia dalam tahun 1945 menurut s 108 Akta Keterangan 1950 ('Akta tersebut'). Usul tersebut disokong oleh afidavit pemohon dan dua orang yang lain. Dua orang yang lain tersebut telah mendeposkan bahawa mereka telah menyaksikan kematian si mati dalam tahun 1938.

Diputuskan, menolak usul tersebut:

(1) Walaupun jika tiada apa-apa khabar didengar mengenai seseorang selama tujuh tahun beliau dianggap sudah mati, tidak ada anggapan mengenai masa kematiannya menurut s 108 Akta tersebut (lihat ms 448H).

(2) Jikalau dikehendaki membuktikan masa tertentu kematian seseorang itu, ianya harus dibuat dengan keterangan sebenar seperti pembuktian mana-mana fakta yang lain (lihat ms 448H); *R Muthu Thambi v K Janagi* [1955] MLJ 47 dan *Re A Penhas, deceased* [1947] MLJ 78 diikut.

(3) Seksyen 108 Akta tersebut meliputi kes di mana tidak ada apa lagi yang diketahui kecuali bahawa tiada apa-apa khabar mengenai seseorang selama tujuh tahun ataupun lebih daripada itu. Ianya tidak menghalang mahkamah daripada membuat keputusan berdasarkan keterangan ikut keadaan bahawa kematian seseorang itu telah berlaku sebelum tamatnya tempoh tujuh tahun dari tarikh kehilangannya (lihat ms 449D–E).]

Notes

For a case on presumption of death on a given date, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1292.

Cases referred to

A Penhas, deceased, Re [1947] MLJ 78 (folld)
Clay, Re [1919] 1 Ch 66 (refd)
Doe d'France v Andrews (1850) 15 QBD 756 (refd)
Ganesh Bux Singh v Mohammad AIR 1944 Oudh 266 (refd)
Gray v Spyer [1922] 2 Ch 22 (refd)
Kamlabai v Umabai AIR 1929 Nag 127 (refd)
Punton & Anor v Ministry of Pensions and National Insurance [1963] 1 WLR 186 (refd)
Prudential Assurance Co v Edmonds (1877) 2 App Cas 487 (refd)
R Muthu Thambi v K Janagi [1955] MLJ 47 (folld)
Smt Mathru v Smt Rani AIR 1986 HP 6 (refd)

Legislation referred to

Evidence Act 1950 ss 107, 108
Rules of the High Court 1980 O 5 r 5

Aslam bin Zainuddin (Assistant Director, Legal Aid Bureau) for the applicant.

Augustine Paul JC: By this motion dated 30 January 1997, Osman bin Bachit ('the applicant') prayed for an order that Dogol bin Bachit ('the deceased') be presumed to have died in 1938 and that he be granted leave to depose that the deceased died in 1945 pursuant to s 108 of the Evidence Act 1950 ('the Act'). The motion was supported by the affidavits of the applicant and two other persons, namely, Mohamed Dom bin Abdullah and Baba bin Din. The material parts of the applicant's affidavit read as follows:

1 Saya adalah pemohon yang dinamakan di atas. Segala fakta yang dideposkan di sini adalah dalam pengetahuan saya kecuali dinyatakan sebaliknya.

2 Dogol bin Bachit (dianggap telah mati) yang dinamakan di atas adalah bapa saya.

3 Bapa saya, Dogol bin Bachit telah meninggal dunia dalam tahun 1938 dan sijil kematiannya tidak dapat dikesan. Sesalinan sijil keputusan mencari di dalam daftar bertarikh 4 November 1996 dilampirkan bersama-sama ini sebagai eksibit yang bertanda 'OB-1'.

4 Bapa saya mempunyai sekeping tanah Lot No 733, Mukim Sungai Udang, Melaka yang luasnya 2a lr 21p. Sesalinan geran tanah dilampirkan bersama-sama ini sebagai eksibit yang bertanda 'OB-2'.

5 Untuk membolehkan pindah milik tanah tersebut dibuat kepada nama saya, dengan hormatnya saya memohon agar mahkamah yang mulia ini memberikan kebenaran kepada pemohon untuk mendepos bahawa Dogol bin Bachit dianggap telah mati kira-kira dalam tahun 1945.

Baba bin Bidin and Mohammad Dom bin Abdullah who had affirmed supporting affidavits for the motion said that they are relatives of the deceased. Both of them deposed that they had witnessed the death of the deceased in 1938. Baba bin Bidin further said that the deceased was buried in the Muslim burial ground at Paya Rumput, Tangga Batu, Melaka. I pause to add that the applicant's prayer that he be granted leave to depose that the deceased died in 1945 when he is alleged to have died in 1938 is with obvious reference to the seven-year period contained in s 108 of the Act.

The motion came up for hearing before me on 20 February 1997. As I entertained some doubts as to the applicability of s 108 to the circumstances of this application, I invited learned federal counsel to submit on the law and adjourned the case to 19 March 1997 for hearing. The fruits of research of learned federal counsel, En Aslam Zainuddin, led him to graciously concede on the adjourned date that the motion may not have been properly anchored on s 108 and left it to me to decide on the matter after having brought to my attention cases such as *R Muthu Thambi v K Janagi* [1955] MLJ 47 and *Re A Penhas, deceased* [1947] MLJ 78.

I shall now consider the scope of s 108 of the Act. An analysis of the section will not be complete and comprehensive without considering s 107 as well. Both sections read as follows:

s 107

When the question is whether a man is alive or dead, and it is shown that he was alive within 30 years, the burden of proving that he is dead is on the person who affirms it.

s 108

When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

Section 107 of the Act deals with the presumption of continuance of life and s 108 deals with the presumption of death. Section 107 provides that when a person's existence is in question and he is shown to have been living at a given time within 30 years and there is nothing to suggest the probability of his death, the continuance of life will be presumed and the person who asserts the contrary has the burden to prove it. Section 108 must be read as a proviso to s 107 as the section provides that if a man has not been heard of for seven years by those who would naturally have heard of him, had he been alive, the presumption of continuance of life ceases and the burden of proving him to be alive lies on the person asserting it by denying the death.

In order to invoke the aid of s 108, two basic facts must be proved. They are:

(a) the person must not have been heard of for seven years; and

(b) this must be by those who would naturally have heard of him, if he had been alive.

The first fact to be proved is self-explanatory while the second requires some elaboration. A person 'has not been heard of' if no reliable information concerning him is received. There is no definite rule as to who are the persons who would 'naturally' have heard of him, if alive. Generally speaking, they are his close relatives or neighbours (see *Doe d'France v Andrews* (1850) 15 QBD 756). Where the question is whether a married woman is dead or alive, her husband, if alive, would be the proper person who would naturally hear of her if she were alive (see *Ganesh Bux Singh v Mohammad* AIR 1944 Oudh 266). A wife who has left her husband and is kept as a mistress by another person is not one of the persons who would naturally hear from him, if he were alive (see *Kamlabai v Umabai* AIR 1929 Nag 127). However, this requirement is not proved if information of him could have been obtained by the exercise of reasonable diligence. Thus, a person can ignore idle gossip but he must not shut his eyes to possible sources of reliable information (see *Prudential Assurance Co v Edmonds* (1877) 2 App Cas 487). If the circumstances of a man's disappearance are such that it is unlikely that his relatives would have heard from him in any event then the court will not presume his death (see *R Muthu Thambi v K Janagi* [1955] MLJ 47).

Although a person who has not been heard of for seven years is presumed to be dead, there is no presumption as to the time of his death under s 108. If it is sought to establish the precise period at which a person died then it must be done so by actual evidence like the proof of any other fact. Support for this can be found in *R Muthu Thambi v K Janagi* where Spenser-Wilkinson J said at pp 48–49:

> In the first place although where a person has not been heard of for a term of not less than seven years, there may be a presumption that he is dead, the onus of proving the death of that person at any particular date must rest with the person to whose case that fact is essential. This proposition was laid down by the Privy Council in the case of *Lal Chand Marwawi v Mahani Ramrup Gir* 42 TLR 159. In the course of the judgment in that case Lord Blanesburgh said:

> 'But the law really is that on the facts now assumed there is no presumption as to Bhawan Gir being dead either in 1902 or 1904. There is only one presumption and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact is a matter of proof. And their Lordships would here observe that it strikes them as not a little remarkable that the theory on this point, on which the plaintiff's pleader hazards his whole case, is still so widely held, although it has so often been shown to be mistaken ... . Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the law of England and, searching for an explanation of this very persistent heresy, their Lordships found it in the words in which the rule both in India and in England is normally expressed.'

His Lordship then quoted a passage from *Re Phene's Trusts* (1870) 5 Ch App 139 and later said:

> 'Probably the true rule would be less liable to be missed and would itself be stated more accurately, if instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one 'of not less than seven years.'

I interpolate to add that s 108 of the Act contemplates a case where nothing more is known than that a person has not been heard of for seven years or more. It does not prevent the court from finding on circumstantial evidence that the death of a person occurred before the expiry of seven years from the date of disappearance. Such a finding of death was made in a petition for letters of administration where the death of the intestate was put in issue in *Re A Penhas, deceased* [1947] MLJ 78.

The section is designed for the purpose of determining whether a man is alive or dead at the time when the question arises in a dispute in a court or proceedings. In this regard, I refer to *Smt Mathru v Smt Rani* AIR 1986 HP 6 where Gupta J said at p 8:

> There is no presumption that a person who has not been heard of for a period of not less than seven years died at the end of the first seven years or on any particular date. The burden of proving the date of death of a person is always upon the person who asserts that a person had died on a certain date because there is no presumption about the date of death. The only presumption under s 108 of the Act is that a person is dead if he has not been heard of for seven years and this presumption only arises when a question is raised in a court, etc as to whether a person is alive or dead. Such presumption can earliest be drawn when a dispute is brought in a court or proceeding.

To revert to the motion before me, the applicant is praying for an order to determine the date of death of the deceased and the facts disclosed in the various affidavits reveal that there is no dispute in a court or proceeding as to whether the deceased is alive or dead. These are matters which do not come within the ambit of s 108 as under that section:

(i) no presumption can arise as to when a person died; and

(ii) such a presumption arises for consideration only when there is a dispute in a court or proceedings as to whether a person is alive or dead.

In the circumstances, the motion filed by the applicant is not competent. However, there is positive evidence of the date of death of the deceased. The applicant may establish this is appropriate proceedings just like any other fact without any reference or resort to s 108. This cannot be done by way of a motion which is restricted in its use to interlocutory matters and as authorized by O 5 r 5 of the Rules of the High Court 1980. Similarly, an action for a declaration which may be begun by writ as well as by originating summons (see *Punton & Anor v Ministry of Pensions and National Insurance* [1963] 1 WLR 186) may not be made against a person who has asserted no right nor formulated any specific claim (see *Re Clay* [1919] 1 Ch 66) nor for a mere legal right without consequential relief (see *Gray v Spyer* [1922] 2 Ch 22). Thus, on the facts presented the applicant would not even be entitled to a declaration to determine the precise period of death of the deceased. In my opinion, the proper cause for the applicant to adopt would be to apply for letters of administration and prove the death of the deceased in that proceedings.

In the upshot I dismiss the motion.

Motion dismissed.

Reported by Mariette Peters-Goh